

The Civil Law Bureau (Civil) acts as legal counsel for 114 executive branch agencies, boards, commissions and councils. It provides legal advice and representation to 38 state agencies, many of which have multiple divisions with varied duties and functions. In addition to the state agencies, Civil also provides legal advice and representation to 53 licensing/regulatory boards and 23 councils/commissions. There are 14 attorneys, 3 of whom are part-time, 2 part-time contract attorneys, 2 paralegals and 4 secretaries. Each attorney is assigned to assist a variety of the client agencies.

In 1999 Civil formed a sub-unit within the bureau to handle the increased number of complex federal cases. The Federal Litigation Unit (FLU) is staffed by an Associate Attorney General, three attorneys, a secretary and a paralegal. The FLU attorneys specialize in federal court procedure. The Attorney General's Office has a permanent seat on the Federal Court Advisory Committee that makes recommendations to the United States District Court on policy and local rules.

Civil handles trial and appellate court litigation for all its clients, provides legal advice through formal written opinions, informal memos and by telephone - frequently on a daily basis. Unlike private law offices, however, Civil has no control over the amount of work that comes through the door. Civil continues to see a marked increase in both the number and complexity of cases and legal issues.

Civil is a dynamic bureau with a large variety of challenging legal issues. In any given week, a Civil attorney may be arguing a First Amendment case in federal court, defending an agency and

its employees in state court, researching a question of law for an agency, preparing a response to a lawsuit against the State in Superior Court, advising an administrative licensing board or briefing and arguing a case in the New Hampshire Supreme Court.

### *Litigation*

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Civil has become primarily a litigation unit rather than the legal advisor it had been in prior years. Approximately sixty-three percent (63%) of Civil's legal practice time is now devoted to litigation. Eighty-three percent (83%) is trial court litigation and seventeen percent (17%) is appellate litigation. Over the last two years, approximately 300 new lawsuits and claims were filed in both state and federal courts against the State and individual state officials and/or employees. Civil attorneys also worked on hundreds of other litigation matters still active from prior years. During the biennium, 34 cases were settled and many cases were resolved judicially. The nature and complexity of the litigation varied significantly. Some cases were resolved in a few months through written motions to the court. Other more complex litigation will take a number of years to resolve and may span the biennium and beyond and may also include both a trial and an appeal.

### **School Funding**

In the case of *Baines, et al. v. Eaton*, filed in July, 2004, plaintiffs challenged the constitutionality of the enactment of 2004 New Hampshire Laws Chapter 200, the State's then-current school funding law, by alleging that the Legislature could not pass a money bill in a Senate Bill, that the Legislature did not follow its own internal rules in

enacting this law, and that the enrolled bill amendment used to make technical corrections to the law was unlawful. The State defended against these claims and on April 20, 2004 received a decision upholding the authority of the Legislature to determine its internal procedures, as long as the procedures do not overrule constitutional requirements. The Court also declined to review Legislature's procedures, holding that the corrections made to Chapter 200 were technical corrections and finding the passage of Chapter 200 to be valid.

### **Diocese of Manchester**

In 2004 both the Civil and Criminal Bureaus became involved in protracted litigation with the Diocese of Manchester (the Diocese). This litigation arose out of the 2002 criminal investigation by the Criminal Bureau into the conduct of the Diocese regarding the manner in which it responded to allegations that some of its priests had engaged in sexual misconduct with children. A grand jury investigation was initiated and the Criminal Bureau was poised to indict the Diocese on the charge of child endangerment. During the pendency of these proceedings the State and the Diocese entered into a non-prosecution agreement that provided a framework for the protection of children to a greater extent than could be realized by a possible prosecution of the Diocese for child endangerment. In the agreement the Diocese acknowledged that certain decisions it made about the assignment of priests who had abused children resulted in other children being victimized and that the State had evidence likely to sustain a conviction against it. The Diocese agreed to implement policies and procedures that would protect

children from sexual abuse by the clergy.

One of the key elements of the non-prosecution agreement was the State's ability to perform an annual audit for a four-year period to ensure that the Diocese had implemented these policies and that they worked to protect children. The Diocese objected to the scope of the State's planned audit and asserted that the State was completely responsible for the cost of the audit. The parties began an almost year long period of litigation to resolve the parties differing interpretation of the non-prosecution agreement. Because this litigation involved interpretation of a contract, attorneys from the Civil Bureau became involved. In March 2005 the Hillsborough County Superior Court ruled in the State's favor, finding that the audit provision of the agreement gives the State the authority to conduct an audit that fully analyzes whether the Diocese's policies are working and protect children in an effective manner. The court also ruled that the parties must equally share the costs of the audit. The first year of the audit began in June 2005 and is on-going.

#### **In re: Liquidation of The Home Insurance Company**

This case is a multi-billion dollar insurance liquidation proceeding commenced in State Superior Court in 2003. The court appointed the Insurance Commissioner as Liquidator to oversee the processing and disposition of claims by policyholders, claimants and creditors of the estate. The liquidation has given rise to several related lawsuits, including cases in the United States District Court, the First Circuit Court of Appeals, Merrimack County Superior Court and the New Hampshire Supreme Court. In one such case filed in 2003, a class of tort claimants challenged the constitutionality of a provision

of the State insurance liquidation statute that allows third party claimants to file claims against the bankrupt insurer but requires the claimants to release the policyholder up to the limits of the insurance policy. The Superior Court upheld the constitutionality of the statute, and the case remains pending on appeal. Given the size and scope of the liquidation proceedings and related cases, the liquidation has required the attention of at least one attorney on a virtually full time basis since its inception.

#### **Class Action Lawsuits**

During the last biennium civil attorneys were involved in four very complex class action lawsuits in both federal and state courts. Two of these cases involve defense of the Department of Health and Human Services' (DHHS) implementation of home and community based care for persons with acquired brain disorders and developmental disabilities.

For example, in *Bryson et al. v. Commissioner et al.*, a group of individuals with acquired brain disorders (or brain injuries) challenged the State's administration of its Medicaid home and community based care waiver for persons with acquired brain disorders. The plaintiffs were individuals who were on a waiting list for services funded by the waiver. The plaintiffs' claims included alleged violations of the Federal Medicaid Act, the Americans with Disabilities Act (ADA), and the Due Process Clause of the United States Constitution. In December 2001, the United States District Court granted declaratory judgment to the class on the Medicaid Act claims, and the State appealed. In 2002, the First Circuit Court of Appeals reversed, holding that Medicaid law allows the State to impose a cap on the size of its waiver program. The case was remanded to the District Court,

where it remains pending. The District Court denied the State's motion for summary judgment on the ADA claims and the matter was tried in federal district court in October 2005. A decision is expected in 2006.

#### **Tax Litigation**

There were several significant tax cases where civil attorneys defended the State's financial interests. In the pending case of *General Electric Company, Inc. v. Commissioner, NH Dept. of Revenue*, GE challenges a provision of the business profits tax statute (RSA 77-A:4, IV). GE appealed a decision from the Commissioner of the Department of Revenue to the superior court claiming that the dividends received deduction allowed under RSA 77-A:4, IV should be invalidated because the statute discriminates against foreign commerce in violation of the commerce clause of the United States Constitution and results in unfair taxation out of proportion to GE's activities in New Hampshire in violation of the Due Process and Commerce Clauses of the U.S. Constitution. In April 2005 the Merrimack County Superior Court held oral argument on the parties' pending motions, including the State's Motion to Dismiss and Motion for Summary Judgment. On August 19, 2005, the court dismissed GE's case granting both the State's motions. GE has filed a motion for clarification and reconsideration. The case will likely be appealed to the New Hampshire Supreme Court.

In *Smith v. Ayotte*, residents of Hollis and Hudson challenged the process of assessing the value of homes. Specifically, New Hampshire law allows assessors to enter property for the purpose of determining its assessed value. If a homeowner does not wish to have an assessor enter the property, the homeowner loses the right to appeal any subsequent assessment. This was challenged

in federal court on constitutional grounds. The federal court dismissed the case on jurisdictional grounds and further stated that there was nothing unreasonable about the process.

### Inmate Litigation

The Department of Corrections is one of Civil's largest clients. It requires significant legal counsel time and accounts for 16% of the Bureau's legal practice time. In addition to the lawsuits filed in both federal and state courts, inmates also regularly file petitions for writs of habeas corpus in state court claiming that they are being held in prison unlawfully. Seventy petitions were filed during the biennium. The State prevailed in the overwhelming majority of these cases. Habeas corpus petitions are usually resolved within a month after submission of a written pleading and a hearing in superior court.

### Appellate Litigation

Under RSA 7:6 the Attorney General must act as attorney for the State in all civil cases

in the Supreme Court where the State has an interest. In January 2004, the Supreme Court amended its rules and implemented a mandatory appeal system. This change has dramatically increased the Bureau's appellate practice. In 2003, the year before the mandatory appeal process was implemented, Civil filed twenty-three briefs in the Supreme Court. In fiscal year 2005, the first full year of mandatory appeals, Civil submitted forty-three briefs. This increased Civil's Bureau's appellate work by eighty-seven percent (87%). Under this new rule the Supreme Court accepts all appeals from a final decision on the merits issued by a superior court, district court, probate court or family division court. Prior to 2004 the Supreme Court had discretion to accept or deny civil appeals.

During the biennium, Civil filed a total of ninety-four appellate briefs. Seventy-eight (78) briefs were filed in the New Hampshire Supreme Court. Seventy-five (75) were in defense of State action and three (3) were State appeals. Approximately

thirty-five percent (35%) of the briefs in defense of state action involved appeals of abuse and neglect or termination of parental rights cases.

Federal appellate work accounted for a smaller portion of Civil's caseload. Fifteen (15) briefs were filed in the First Circuit Court of Appeals and one (1) brief

was filed in the United States Supreme Court.

### Election Law

The Civil Bureau has responsibility for the Attorney General's duties related to election law enforcement and provides legal counsel to the Secretary of State, who administers elections statewide. Bureau attorneys defend the State or the Secretary of State in actions before the Ballot Law Commission, Superior Court and the Supreme Court. Approximately seven percent of the bureau's efforts address election law related legal issues. There were also two notable cases involving election law that were filed during the biennium.

### Election Day

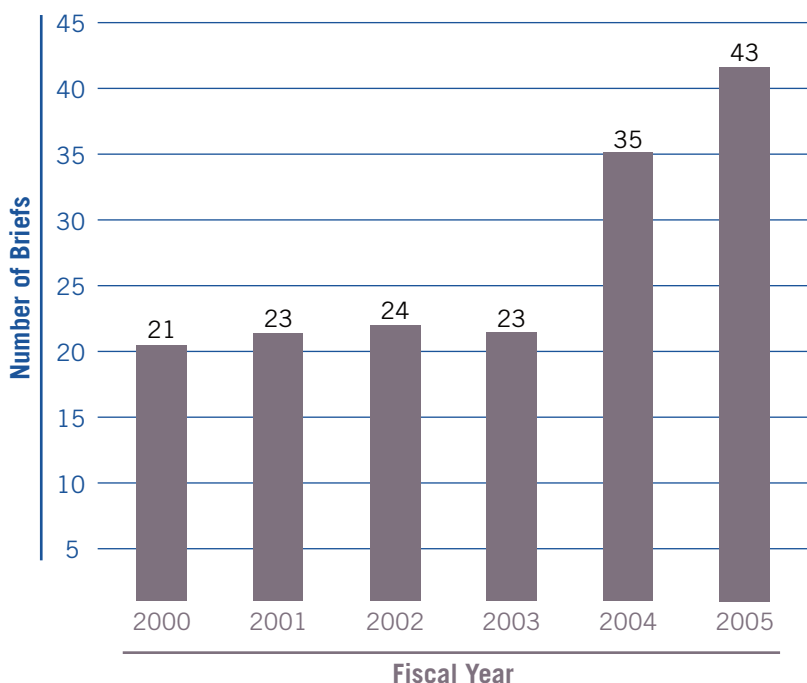
On each statewide Election Day the Attorney General's office uses all available attorneys, investigators, and at recent elections specially trained sheriff's deputies, to conduct on-site inspections of polling places throughout the state. Generally, the office is able to have a representative of our office at most polling places within 30 minutes following the receipt of a complaint. At the November 2, 2004 general election approximately 400 phone calls were received on the Attorney General's Election Line, a toll-free election phone line maintained by the office. Several complaints required attorneys or investigators to go to polling places to investigate complaints or resolve problems. At the Presidential Primary and at the General Election attorneys staffed the polling places in several college towns, remaining available throughout the day to address concerns with voter fraud or denial of voting.

### Enforcement Activities

The Attorney General's Office is the primary law enforcement agency for election law violations. The Office receives and

### Civil Bureau Supreme Court Briefs

Fiscal Years 2000–2005



investigates complaints regarding state and local elections, town, school and village district meetings, and other election law violations. The volume of complaints is highest during the presidential election period, but even in off years it is common to receive 100 or more complaints that warrant some inquiry or investigation. The Office is currently examining a significant number of voters who have been identified by concerned citizens who suspect voter fraud or election law violations at the November 2004 General Election. No evidence of widespread voting fraud has yet been found. To date one case has resulted in a criminal conviction and one in a civil sanction.

This Office also handles a significant number of complaints each year related to local elections, as well as town or school meetings irregularities. Issues range from denial of paper ballot votes during a business meeting or miscounting of ballots to denial of the right to vote. The Bureau works closely with the local election officials to try to prevent law violations and where practical uses an educational approach to deter future law violations.

#### **Help America Vote Act (HAVA)**

HAVA has imposed a significant new demand on Civil. HAVA requires the State to:

- Provide at least one voting machine in each polling place to enable most voters with disabilities to vote privately and independently;
- Create a new uniform centralized statewide database of registered voters that shall be the source for the official checklist for each town and city;
- Assist towns and cities in ensuring their polling places are accessible for people with disabilities and the elderly;

- Ensure each qualified individual has an equal right to register and vote through statewide uniform election procedures and standards;
- Provide voter and election official education; and,
- Maintain a statewide complaint system for the uniform, nondiscriminatory investigation and resolution of complaints.

Significant attorney time has been required to fulfill the obligations imposed on this Office described above. This Office has also worked closely with the Secretary of State, providing legal advice throughout the acquisition and development of the statewide database of registered voters, the ongoing acquisition of technology to assist voters with disabilities and in developing and presenting the required training. HAVA will continue to demand a significant number of attorney hours while these new programs are implemented, local election officials are trained, and enforcement efforts are undertaken to ensure compliance with federal law.

#### **Polling Place Accessibility**

In fulfillment of the obligations imposed by HAVA and as part of an ongoing effort to enforce Part 1, Article 11 of the New Hampshire Constitution, which requires that polling places be accessible, during the biennium this Office has conducted inspections of over 300 polling places in the State. With the assistance of deputy sheriffs from every county in the State an initial survey of all polling places was completed. Where possible deficiencies were identified, attorneys worked with specialists who conducted more extensive re-inspections and worked with local officials to identify practical solutions to accessibility deficiencies.

#### **Campaign Contributions & Expenditures, Gift Reports, Lobbyist Reports, Ethics Reports**

The elections attorneys also carry out the Attorney General's statutory duties to examine and ensure that voluminous public disclosures related to campaign finance, gifts to public officials or employees, lobbyist income and expense reports, and ethics reports comply with the law.

#### **Educational Activities**

The Attorney General's Office believes that prevention is the most cost effective form of law enforcement. In cooperation with the Secretary of State, attorneys from the Bureau routinely conduct or support training for local government officials and the public on the election laws. During this biennium, attorneys working with the Secretary of State presented an election law update and training on the proper conduct of elections to over 1500 local election officials through a four-hour class presented more than twenty times at different locations. Attorneys helped develop "How to Vote" and "Polling Place Accessibility" videos and other voter education programs which have been distributed to local election officials and are available on the Secretary of State's web site. Attorneys have worked with the Secretary of State in developing voter education materials and signs for display on Election Day at the polling places. Signs displaying the toll free Attorney General's Election-Line phone number are provided to each polling place by the Secretary of State. Shortly before the General Election, this Office issued all Moderators and Town Clerks a 22-page checklist of legal issues expected to surface at the general election. Special training sessions for moderators have also been conducted regionally.



## Election Litigation

There were two significant election law cases litigated during the biennium. In the case of *Aikins v. Secretary of State*, the plaintiffs challenged the constitutionality of the statute that specifies the relative position of candidates and the political parties with which they are affiliated on the general election ballot. The plaintiffs argued that the current statute, which gives first position to the candidates of the party that received the most votes in the prior election, gives those candidates an impermissible advantage. They asked the Court to impose some form of name and party columns rotation on ballots and/or random selection of which candidate or party is placed in the first position. The State argued that it has a compelling interest in presenting voters with a clear and easily understood ballot and that determining ballot structure is a prerogative of the Legislature. The Superior Court ruled that the statute is constitutional. This decision is subject to appeal.

*Libertarian Party v. State of New Hampshire* involved a challenge to the constitutionality of statutes that require third parties or independent candidates to demonstrate a minimal level of support, by obtaining petitions signed by a certain number of voters, in order to have their names placed on the ballot. The Plaintiffs alleged that this burden violated the “equal right to be elected” and the equal protection clauses of the New Hampshire Constitution. The State argued that the State has a compelling interest in keeping the ballot free from confusing or deceptive or frivolous candidates and that this issue is settled under the federal constitution with courts consistently upholding more onerous ballot access requirements than those imposed by New Hampshire law. The Superior Court ruled in the

State’s favor and dismissed the claim. The case is currently on appeal to the New Hampshire Supreme Court.

## Legal Advice And Assistance

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Providing legal advice to state agencies, boards and commissions is a core function of Civil and represents approximately 37% of attorney legal practice time for the biennium. Agencies require legal assistance interpreting and implementing the laws that define their obligations. The type of legal assistance varies depending on the nature of the issue. Some questions have broad applicability throughout state government, involve significant legal research and require a written analysis by the assigned attorney. Other questions can be answered by a brief memo to the agency. Civil attorneys also consult with their clients informally and frequently through telephone contact or e-mail. The goal is to be accessible to the client agencies and provide them with the legal tools they need to carry out their mission.

## Land Conservation

The Legislature charged the State to protect land, through purchases of conservation easements or fee interest, in order to sustain traditional forest uses, such as logging; ensure multiple use conservation purposes, such as limiting development but allowing public access for recreational use; and protect and sustain traditional agricultural uses. Recently the Civil attorneys assisted with conserving more than 203,000 acres of land in the state through several conservation projects including: 962 acres in Dunbarton known as “Kimball Pond,” 18,430 acres in Columbia and Stratford known as the “Vickie Bunnell Tract,” 10,198 acres in Jefferson and Randolph known as the “Pond

of Safety Tract,” 5,316 acres in Errol and Cambridge known as “13 Mile Woods,” 5,300 acres in Freedom and Madison known as “Trout Pond,” and last, but by far not least, a conservation easement and fee interests in 172,000 acres in Pittsburg, Clarksville, and Stewartstown known as the “Connecticut Lakes Headwaters property.”

The Connecticut Lakes Headwaters property is considered an integral piece of the Northern Forest which consists of 31 million acres that stretch across Maine, New Hampshire, Vermont, New York, and southern Canada. On December 30, 2002, three portions of this property, totaling approximately 25,000 acres, were acquired by the Fish and Game Department in fee and became known as “the Natural Areas.” On October 10, 2003, the Department of Resources and Economic Development (DRED) acquired a conservation easement over 146,400 acres, which are owned by a private timber company, to limit development on the property, to ensure continuation of traditional forest uses, and to ensure public access, both motorized and non-motorized, for recreational uses on the property. DRED also acquired 100 acres in fee to increase the size of Deer Mountain Campground, 8.45 acres in fee for the Magalloway Mountain Fire Lookout Tower, and 3,264 acres in fee for all of the roads on the property that are open for public use.

Civil attorneys also worked with the Department of Agriculture, Food and Markets which acquires and manages agricultural land preservation easements. New Hampshire, like many other states, is facing population growth resulting in the development of large tracts of land traditionally used for agricultural purposes. In order to protect some of these properties, the Legislature established the

Agricultural Land Preservation Committee and authorized it to purchase or accept gifts of easements that preserve land for agricultural uses.

While creating and defending against violations of conservation easements takes significant attorney time, the negotiations and drafting of the documents to acquire the Connecticut Lakes Headwater property took more than two years. The benefits to the State, and the Northeast, as a result of the conservation of these properties will continue for generations to come.

### **Representation Of Professional Licensing Boards**

The Bureau represents and provides legal advice to licensing boards and other executive branch agencies whose statutory duties include adjudicative, prosecutorial and investigative functions. These boards are comprised primarily of volunteers from the licensed professions. The role of civil attorneys is to

assist each board to effectively and lawfully carry out their statutory duties.

In an effort to provide broad support for the boards, the Civil and Consumer Protection Bureaus have presented annual training seminars for board members and staff. Training topics include writing orders, ethical issues, how to conduct an administrative hearing, the applicability of the Right-To-Know Law, principles of due process and mock hearings. The goal of the bureau's work with the boards is to ensure due process, prevent problems from occurring and minimizing the potential for appeals by assisting boards in the earliest stages of proceedings.

A recent trend is the increased complexity and litigious nature of the proceedings before the boards. Parties to contested cases are now more likely to be represented by counsel, file more sophisticated motions and demand more extensive discovery—resulting in longer hearings.

### **Contract Review**

Review of contracts and leases is an important aspect of providing legal assistance to state agencies. Over the last two-year period Civil reviewed and approved more than 3500 contracts and leases. A large proportion of these contracts are reviewed and returned to the agencies within one week. All executive branch agencies submit contracts and leases to their assigned attorney for review to ensure legal sufficiency prior to submission to Governor and Council. In addition to reviewing final contract documents, attorneys also frequently consult with agency staff regarding contract and bid related questions. Civil attorneys also assist state agencies with Information Technology procurement projects and review numerous Information Technology contracts. The complexities of these contracts have required substantial legal resources.